IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

	*	
BLUELINX CORPORATION,	*	
a Georgia Corporation,	*	4:05-cv-00139
	*	
Plaintiff,	*	
	*	
V.	*	
	*	
OVERTURF & ASSOCIATES, INC.,	*	
an Iowa corporation,	*	MEMORANDUM OPINION
	*	AND ORDER
Defendant.	*	
	*	

I. INTRODUCTION

Before the Court is Bluelinx Corporation's ("Bluelinx") Motion for Summary Judgment (Clerk's No. 16), filed October 28, 2005. Bluelinx is a Georgia corporation with its principal place of business in Atlanta, Georgia. The Defendant, Overturf & Associates, Inc. ("Overturf"), is an Iowa corporation with its principal place of business in Norwalk, Iowa. The case is before the Court pursuant to 28 U.S.C. § 1332. Overturf filed a Resistance (Clerk's No. 18) to Bluelinx's Motion for Summary Judgment on December 20, 2005, and Bluelinx filed a Reply (Clerk's No. 19) on January 4, 2006. The matter is fully submitted.

II. FACTS

From August 2004 through October 2004, Overturf made sixteen separate orders from Bluelinx for construction materials. Johns Aff. ¶ 5. Overturf placed all of the orders by telephone. *Id.* at ¶ 6. The terms of the orders and invoices required payment within thirty days, subject to an interest rate of one and one-half percent per month for overdue payments. Bluelinx claims that it promptly

shipped the goods for each order to Overturf. In support of its position, Bluelinx presents the affidavit of an employee, Kathleen Johns (Clerk's No. 16-2), together with copies of sixteen invoices (Clerk's No. 16-3) representing the sixteen orders. Johns states in her affidavit that Bluelinx shipped all of the materials to Overturf, but that it has not received any payments from Overturf. Johns also states that as of October 31, 2005, Overturf owed Bluelinx \$221,552.54 in payments and interest. Johns Aff. at ¶¶ 8, 11. Bluelinx's submissions include various shipping documents with signatures (Clerk's No. 16-4).

Overturf contends that it never received the goods for four of the sixteen orders. Overturf's position is supported by the affidavit of Michael Overturf, President of Overturf & Associates. Michael Overturf states in his affidavit that Overturf never received goods for four of the invoices it received from Bluelinx. These invoices are numbered 740-624945, 740-625030, 740-625032, and 740-625073 (Clerk's 18-3 at pp. 3-6.) The four invoices are for reinforcement bar, or rebar, worth \$56,580.14. Michael Overturf states in his affidavit that he does not recognize the signatures on the bills of lading provided by Bluelinx. Overturf Aff. ¶ 4. He also states that he reviewed inventory records for Overturf's Lincoln and Omaha facilities and, based on these records, concluded that Overturf did not receive any rebar from Bluelinx during the dates represented by the four disputed invoices. *Id.* at ¶ 10.

To date, Overturf has not paid Bluelinx for any of the sixteen orders, despite written demands from Bluelinx. Johns Aff. at ¶ 10; Overturf Answer ¶ 12. Bluelinx seeks payment for all sixteen orders, plus interest, costs of collection, and attorney's fees.

III. STANDARD FOR SUMMARY JUDGMENT

In a motion for summary judgment, the Court's task is to view the evidence presented in the

parties' filings in the light most favorable to the nonmoving party. The Court must decide whether there is any material factual dispute that requires a trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2712 (3d ed. 2005). A party seeking summary judgment bears the initial responsibility of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). The party opposing the motion for summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). If there is no genuine issue as to any material fact, the Court will determine whether the moving party is entitled to judgment as a matter of law. *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999).

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48. An issue is "genuine" if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Finally, in considering a motion for summary judgment, the Court does not weigh the evidence or make credibility determinations. *See id.* at 255. The Court only determines whether there are any disputed facts and, if so, whether those factual disputes are both genuine and material. *Id.* at 250.

IV. ANALYSIS

Bluelinx argues that Michael Overturf's contention that he does not recognize the signatures on the bills of lading is not sufficient to persuade a jury that Overturf did not receive the goods. In addition, Bluelinx argues that Overturf's inventory records are "facially suspect" because Overturf does not indicate that they are reliable or accurate. Bluelinx points to the bills of lading and shipping invoices from the third-party shipper as conclusive proof that the shipments were delivered.

Neither party has provided briefing on the substantive law that is applicable in this case. It is well-established that, when sitting in diversity, federal courts must apply the substantive law of the forum state in the absence of controlling federal law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). In the absence of any arguments to the contrary on the part of either party, the Court will look to Iowa law.

Iowa's version of the Uniform Commercial Code (UCC) provides that when a buyer of goods fails to pay the price as it becomes due, the seller may recover the price of "goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer." Iowa Code § 554.2709(1)(a). In order to recover the price of goods under this section, the plaintiff-seller must establish that: (1) it performed according to the terms of the contract; (2) the goods were accepted by the buyer; (3) the price of goods was accepted; (4) the due date for payment has passed; and (5) the buyer failed to pay. *Precision Indus. v. Behnke Lubricants, Inc.*, 396 F. Supp. 2d 1012, 1017 (S.D. Iowa 2005); *Purina Mills, L.L.C. v. Less*, 295 F. Supp. 2d 1017, 1033 (N.D. Iowa 2003) (citing 24 Williston on Contracts § 66:21 (Richard A. Lord 4th ed.)). The burden is on the plaintiff-seller to prove it has performed in accordance with the contract. 24 Williston

on Contracts § 66:21.

Here, Michael Overturf's affidavit is sufficient to present a genuine issue of material fact as to whether Overturf accepted the goods for four of the orders. It is noteworthy that Bluelinx's objections to the affidavit turn on the credibility of Michael Overturf's statements and the reliability of his inventory records. Both credibility and trustworthiness are questions for a jury to decide. *See Kenney v. Swift Transp., Inc.* (8th Cir. 2003) ("In ruling on a motion for summary judgment a court must not weigh evidence or make credibility determinations.") (citing *Anderson*, 477 U.S. at 255). Because Overturf has presented a genuine issue of material fact as to whether it accepted the goods for four of the sixteen orders, Bluelinx's Motion for Summary Judgment is DENIED with respect to those four orders.

Bluelinx's Motion for Summary Judgment is GRANTED with respect to the remaining twelve orders, and Overturf is ordered to pay Bluelinx the amount owed for those twelve orders, plus interest at a rate of one and one-half percent a month, as provided in the sales agreement, and collection costs.

Bluelinx's request for attorney's fees will be decided when all of the issues in dispute are resolved.

The Motion for Summary Judgment is GRANTED in part and DENIED in part.

IT IS SO ORDERED.

Dated this ____15th____ day of February, 2006.

Robert W. Pratt ROBERT W. PRATT U.S. DISTRICT JUDGE

¹It is worth noting that at common law, delivery was an essential element in the seller's proof for recovery of the price of goods. Under the UCC, "delivery is not essential to the seller's cause of action unless such is required for the buyer's acceptance." 24 Williston on Contracts § 66:21.